

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: ADAMS GOLF, INC.
SECURITIES LITIGATION

)
) Civil Action No. 99-371-KAJ
) (CONSOLIDATED)
)

**APPENDIX TO UNDERWRITER DEFENDANTS' ANSWERING
BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE
AND EXCLUDE TESTIMONY OF EDWARD NECARSULMER III**

VOLUME I OF III

B1-B195

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Dated: October 9, 2006
754546/23310

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

COPY

IN RE: ADAMS GOLF, INC. :
SECURITIES LITIGATION :

ORAL DEPOSITION
OF

EDWARD NECARSULMER, III
Monday, August 7, 2006

Oral deposition of EDWARD NECARSULMER,
III, held at the offices of SIMPSON THACHER &
BARTLETT, LLP, 425 Lexington Avenue, New York,
New York, commencing at 12:08 p.m., reported
by Pamela Harrison, RMR, CRR, CSR and Notary
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1 EDWARD NECARSULMER, III

2 MR. LEWIS: The stipulations that
3 we have been proceeding under, as I
4 understand it, are waiving, sealing,
5 certification, and filing of the
6 transcript, and otherwise proceeding
7 under the federal rules.

8 MR. GLUCKOW: Give me those
9 again.

10 MR. LEWIS: Sealing.

11 MR. GLUCKOW: Right.

12 MR. LEWIS: Certification.

13 MR. GLUCKOW: Okay.

14 MR. LEWIS: And filing.

15 MR. GLUCKOW: Okay.

16 MR. LEWIS: Some of which
17 probably are already mooted by the
18 latest federal rules.

19 MR. GLUCKOW: Right.

20 MR. LEWIS: And I suppose you
21 want to reserve read and sign for
22 Mr. Necarsulmer?

23 MR. GLUCKOW: Exactly. Yes.

24 THE WITNESS: Perfect.

25 - - -

1 EDWARD NECARSULMER, III
2 EDWARD NECARSULMER, III, after
3 having been duly sworn, was examined
4 and testified as follows:

5 - - -

6 EXAMINATION

7 - - -

8 BY MR. LEWIS:

9 Q. Would you state your name and
10 address for the record.

11 A. Edward Necarsulmer, III, P.O.
12 Box 1173, Quogue, Q-U-O-G-U-E, New York, 11959.

13 MR. LEWIS: As a preliminary,
14 since there is a simultaneous
15 deposition going on in this case in
16 Houston today, Mr. Collins suggested to
17 me that I pick up with numbering today
18 at 320, leaving a gap between the end
19 of the last deposition and his, which
20 might result in a few blank numbers but
21 will keep us from having two exhibits
22 with the same number.

23 So I'm going to pick up at 320,
24 and I'm just going to mark for the
25 record as Exhibit 320 a document -- a

1 EDWARD NECARSULMER, III
2 letter from Ted McEvoy to Todd Collins,
3 enclosing documents NECARS 1 through
4 29.

5 (Whereupon, a document was
6 marked, for identification purposes, as
7 Exhibit 320.)

8 MR. LEWIS: I guess my question
9 really is to Mr. Gluckow. Has there
10 been any other production of documents
11 from this witness that you are aware
12 of?

13 MR. GLUCKOW: Yes, there was a
14 subsequent production I think just on
15 the heels of the rebuttal report.

16 MR. KANE: Yes.

17 MR. GLUCKOW: Ryan probably has
18 the Bates numbers. I think it was just
19 a half dozen more pages. We can
20 probably get a copy for you, but I
21 think it's NECARS 30 through 33 or 35
22 or 37, or something like that.

23 MR. LEWIS: Somehow that seems to
24 have slipped through the cracks. If I
25 could see a copy of that before.

1 EDWARD NECARSULMER, III

2 MR. KANE: I can get it to you
3 during the break. It was sent to
4 Mr. Collins.

5 MR. LEWIS: Okay.

6 BY MR. LEWIS:

7 Q. Mr. Necarsulmer, my name is Don
8 Lewis. I represent the plaintiffs in this
9 action, and I'm going to be asking you some
10 questions this afternoon. If I drop my voice,
11 garble my words, let me know and I'll have the
12 question read back to you. If I ask the
13 question in an incomprehensible way to you, let
14 me know and I'll reframe the question for you.

15 A. Fine.

16 Q. How did you come to be retained
17 in this litigation?

18 A. I have worked -- I have done
19 some prior work with the law firm, Simpson
20 Thacher.

21 Q. Was that in the AMF Bowling
22 litigation?

23 A. Correct.

24 Q. Have you done other work as an
25 expert witness for Simpson Thacher?

1 EDWARD NECARSULMER, III

2 A. I did work as a consulting
3 expert in a confidential matter prior to the
4 AMF.

5 Q. A confidential matter involving
6 due diligence?

7 A. Correct. Similar situation,
8 just never -- it was settled.

9 Q. Is there some reason that you
10 can't disclose the name of the client in that
11 matter?

12 MR. GLUCKOW: Why don't I take it
13 up with Mr. Necarsulmer. It may well
14 be that it was a confidential
15 engagement. My understanding is that
16 there was no report and that it was
17 just a consulting behind the scenes.

18 MR. LEWIS: All right.

19 BY MR. LEWIS:

20 Q. Is that your understanding as
21 well?

22 A. That's correct.

23 Q. So have you generated expert
24 witness reports for the Simpson Thacher firm
25 before accepting the AMF litigation?

1 EDWARD NECARSULMER, III

2 A. No.

3 MR. GLUCKOW: Object -- you've
4 got to give me a chance just to object
5 in general before you give your answer.

6 Objection to the form of the
7 question.

8 You can answer.

9 THE WITNESS: The answer is no.

10 (Whereupon, documents were
11 marked, for identification purposes, as
12 Exhibit 321 and Exhibit 322.)

13 BY MR. LEWIS:

14 Q. Let me hand you what I'm marking
15 as Exhibits 321 and 322. 321 is a copy of your
16 expert report, and 322 is a copy of your
17 rebuttal report.

18 Am I correct that Exhibit 321
19 is a copy of the expert report you rendered in
20 this litigation?

21 A. Yes.

22 Q. And that 322 is a copy of your
23 rebuttal report?

24 A. Yes.

25 Q. When were you retained in this

1 EDWARD NECARSULMER, III

2 litigation, approximately?

3 A. I believe in April.

4 Q. Were you given any specific
5 instructions with respect to putting together an
6 expert report in this case?

7 A. No.

8 Q. What kind of guidance were you
9 given, if any?

10 A. Basically to review the
11 material, make my own determination as to how I
12 felt about the issue to which I was going to
13 opine. Really nothing further than that.

14 Q. When did you start to review the
15 materials and to make your determination as to
16 what you thought about them?

17 A. I think -- I'm not a hundred
18 percent certain that I remember the dates I
19 received them, but as soon as I began to get the
20 materials, which I believe was probably in
21 April, also.

22 Q. Did anyone assist you in
23 drafting either of your reports?

24 A. No.

25 Q. Between the time of your initial

1 EDWARD NECARSULMER, III
2 contact with Simpson Thacher in this litigation
3 and the time you generated your first expert
4 report, did you participate in any meetings with
5 respect to the report?

6 MR. GLUCKOW: Objection to the
7 form.

8 You can answer.

9 THE WITNESS: Yes; however, it
10 was really after the report was
11 written.

12 BY MR. LEWIS:

13 Q. Okay. And where was the
14 meeting?

15 A. We did a conference call, a
16 web-based conference call.

17 Q. Was that a type of call in which
18 you can see each other?

19 A. No, it was a type of call in
20 which you could see a document.

21 Q. And had you completed the final
22 touches on your expert report by the time that
23 web-based conference call was held?

24 MR. GLUCKOW: Objection to the
25 form.

1 EDWARD NECARSULMER, III

2 You can answer.

3 THE WITNESS: Yes.

4 BY MR. LEWIS:

5 Q. Who participated in that call?

6 A. Mr. Gluckow and perhaps one of
7 his associates and a firm called Cornerstone,
8 and I don't actually recall if anyone from Akin
9 Gump was on the call or not. I think they were
10 not on the call, so I would limit -- rephrase
11 the answer to someone from Cornerstone and from
12 Simpson Thacher.

13 (Whereupon, a document was
14 marked, for identification purposes, as
15 Exhibit 323.)

16 BY MR. LEWIS:

17 Q. I'll show you next what has been
18 marked as Exhibit 323, which appears to be an
19 e-mail from Mr. Gluckow to yourself, dated April
20 28, 2006.

21 Did you receive some version of
22 that e-mail from Mr. Gluckow?

23 A. I did.

24 Q. The first line of the e-mail
25 reads: "It looks like the person from Lehman

1 EDWARD NECARSULMER, III

2 will not be able to make a meeting on May 8th
3 (and in fact will be out that entire week)."

4 What do you understand the
5 reference to a meeting on May 8th to be?

6 A. It was a meeting to meet with
7 the ultimate client and just to have them look
8 me over and shake my hand.

9 Q. Was that meeting to occur before
10 you've completed your expert witness report?

11 A. Yes.

12 Q. Would it be fair to say your
13 expert witness report was completed on the date
14 you signed it?

15 A. Correct.

16 Q. Did you ever attend a meeting
17 with a person from Lehman to make the
18 determination you referred to?

19 A. Yes.

20 Q. And when did that take place?

21 A. I don't recall the date.

22 Q. Sometime in the month of May?

23 A. Yes.

24 Q. Was the person from Cornerstone
25 who participated in the web-based conference

1 EDWARD NECARSULMER, III

2 call someone named Adel Turki?

3 A. Yes.

4 Q. Am I mispronouncing his name?

5 MR. GLUCKOW: It's Adel.

6 MR. LEWIS: Adel.

7 BY MR. LEWIS:

8 Q. Who was Mr. Turki?

9 A. He is the -- I believe he is the
10 manager of the project, the expert project,
11 working with Simpson Thacher.

12 Q. Did you have an understanding as
13 to why he was participating in a web-based
14 conference call that dealt with your expert
15 witness report?

16 A. To the best of my knowledge, he
17 was coordinating all the expert material and he
18 also was the facilitator.

19 Q. Did Mr. Turki provide you with
20 any thoughts regarding your report?

21 A. I don't believe he did.

22 Q. Did anyone from Cornerstone
23 supply you with any materials relating to your
24 project before you completed your report?

25 A. No.

1 EDWARD NECARSULMER, III

2 Q. At the time the web-based call
3 took place, was your expert report in exactly
4 the same form as it now appears --

5 A. Yes.

6 Q. -- as Exhibit 321?

7 A. Yes.

8 Q. Including your signature?

9 A. No.

10 Q. So when was the report actually
11 finished but for your signature?

12 A. Either July 10th or July 11th, I
13 entered the date of the signature line.

14 Q. And the web-based conference
15 call took place a month earlier?

16 A. No. Maybe a week earlier, that
17 sort of a time period.

18 Q. Between the time of your --
19 between the date July 12, on which your first
20 report was signed, and the date of July 26th,
21 2006, on which your rebuttal report was signed,
22 did you have any meetings with anyone concerning
23 your rebuttal report?

24 A. We had a similar conference call
25 on the rebuttal report.

1 EDWARD NECARSULMER, III

2 Q. Can you recall any of the
3 participants in the similar conference call?

4 A. I think it was a -- with the
5 exception of the associates from Cornerstone
6 whose name I just don't know, it would have been
7 the same cast of characters as the first
8 conference call.

9 Q. And do you believe there was
10 someone from Akin Gump on that second call?

11 A. Yes.

12 Q. And who was it?

13 A. I don't know.

14 MR. LEWIS: Off the record.

15 (A discussion was held off the
16 record.)

17 BY MR. LEWIS:

18 Q. How long did it take you to
19 write your initial expert report?

20 MR. GLUCKOW: You mean --

21 MR. LEWIS: Drafting terms.

22 MR. GLUCKOW: So you're not
23 including all the time he spent
24 reviewing materials, you are just
25 talking about sitting at the computer

1 EDWARD NECARSULMER, III

2 drafting?

3 MR. LEWIS: Drafting.

4 THE WITNESS: I mean, I would
5 estimate between, you know, four and
6 six hours of actual time, but my method
7 of working is I go back at this
8 thing -- you know, I'll write the
9 report, I'll go back at it, I'll think
10 about it, I might move things around a
11 little bit, so it may have been a
12 longer period than that, but, you know.

13 BY MR. LEWIS:

14 Q. How long had you spent reviewing
15 the materials before you sat down to write the
16 report?

17 A. I'm going to estimate 40-plus
18 hours.

19 Q. Can you describe as you recall
20 it the process you went through in reviewing the
21 materials?

22 MR. GLUCKOW: Objection to the
23 form.

24 You can answer.

25 THE WITNESS: I usually do it box

1 EDWARD NECARSULMER, III
2 by box, and what I'll do is I'll try to
3 order the boxes, actually just in
4 physical stack, as to the things that I
5 want to look at again or want to, you
6 know, give more scrutiny to. But I
7 just go through things, documents one
8 after another, and I try to do it for
9 as long a period as I can and still
10 remain able to retain the material.

11 BY MR. LEWIS:

12 Q. As you were doing that, did you
13 make notes?

14 A. I did not.

15 Q. Did you make notations on
16 Post-its?

17 A. No.

18 Q. You just segregated the
19 materials that you wanted to look back at?

20 A. Yes. The only indication I
21 would ever make is I would make a checkmark to
22 show that I've read it, and sometimes I put a
23 date on it to show that I've read it.

24 Q. Is there some reason that you
25 didn't make notes on materials like that?

1 EDWARD NECARSULMER, III

2 A. It's -- I will always -- I've
3 been under the impression from when I've worked
4 on these cases that that's not -- that drafts
5 and notes are not the best things for expert
6 witnesses to do.

7 Q. Did you receive instructions to
8 that effect in this case?

9 A. No, no instructions in this
10 particular case, that's just my understanding of
11 the responsibilities.

12 Q. When you actually wrote up your
13 report, did you use the AMF Bowling report as a
14 template --

15 A. Yes.

16 Q. -- for the report that you were
17 writing?

18 A. Yes.

19 MR. LEWIS: Let me just mark that
20 as Exhibit 324.

21 (Whereupon, a document was
22 marked, for identification purposes, as
23 Exhibit 324.)

24 BY MR. LEWIS:

25 Q. Do you recognize this as a copy

1 EDWARD NECARSULMER, III
2 of an expert witness report that you generated
3 in the AMF case?

4 A. Yes.

5 Q. I'll try to put the questions
6 together for speed, but we'll break them apart
7 if it becomes a problem.

8 In drafting either the expert
9 report or the rebuttal expert report, did you
10 create any drafts?

11 A. No.

12 Q. Before you actually -- would it
13 be fair to say that before you actually signed
14 either of the reports, you participated in one
15 of these web-based conference calls in which the
16 text of the report was shown to your -- to the
17 attorneys who retained you before you actually
18 signed the document?

19 MR. GLUCKOW: Can I just have
20 that one read back? I missed the
21 beginning.

22 (The court reporter read the
23 record as follows:

24 "QUESTION: Before you actually
25 -- would it be fair to say that before

1 EDWARD NECARSULMER, III
2 you actually signed either of the
3 reports, you participated in one of
4 these web-based conference calls in
5 which the text of the report was shown
6 to your -- to the attorneys who
7 retained you before you actually signed
8 the document?")

9 MR. GLUCKOW: You can answer.

10 THE WITNESS: Yes.

11 BY MR. LEWIS:

12 Q. Were any changes made to either
13 of the reports after the web-based conference
14 calls?

15 A. The only change -- and it's true
16 of both reports -- were one of punctuation and
17 one of numbering. I can't tell you on which
18 report was which.

19 Q. Fair enough.

20 But no substantive changes?

21 A. Nothing of substance.

22 Q. So after the punctuation or
23 numbering changes were made, you edited the
24 document in whatever word processing system you
25 had, finalized it, and never had a different

1 EDWARD NECARSULMER, III

2 hard copy draft?

3 A. No. I mean, that is correct.

4 Q. You never -- you had it only on
5 your screen before the final version was printed
6 out?

7 A. That is correct.

8 Q. And approximately how many hours
9 in total have you devoted to this litigation so
10 far?

11 A. I would have to look in my time
12 book, but right up around 60 before today.

13 Q. In your expert report numbered
14 321 you have listed as Exhibit B Materials
15 Considered. Can you explain what the heading
16 Materials Considered means to you?

17 A. Basically all the documents
18 involved in the case that I reviewed.

19 Q. In rendering your opinion, did
20 you consider any information from sources other
21 than the items that are listed in Exhibit B to
22 your expert report?

23 MR. GLUCKOW: You mean specific
24 to this litigation?

25 MR. LEWIS: Specific -- well --

1 EDWARD NECARSULMER, III

2 THE WITNESS: No.

3 MR. LEWIS: -- of any source.

4 BY MR. LEWIS:

5 Q. Just -- I'm not trying to be
6 vague here. Did you receive any information
7 from Lehman Brothers --

8 A. No.

9 Q. -- regarding its due diligence
10 process other than what you saw in the
11 transcripts, court filings, exhibits?

12 A. The answer is no.

13 Q. And did you receive any
14 information from your -- from the counsel who
15 retained you, Simpson Thacher, about the due
16 diligence process or their views as to what had
17 happened in due diligence?

18 A. No.

19 MR. GLUCKOW: Other than what's
20 set forth in the exhibit.

21 THE WITNESS: I thought that was
22 the question.

23 BY MR. LEWIS:

24 Q. I'm sorry, I have a tendency to
25 try to sharpen at the end and it sometimes will

1 EDWARD NECARSULMER, III
2 change the direction of the question, so you
3 will probably be better served if you wait for
4 me, and I'll try to wait for you and try not to
5 overspeak you on these questions.

6 Did you receive anything in the
7 nature of deposition summaries from anyone
8 related to this litigation?

9 A. I -- no.

10 Q. Did you receive any legal
11 analysis from counsel in this litigation other
12 than what may be reflected in Exhibit B?

13 A. No.

14 Q. Did anyone from Lehman Brothers
15 discuss the due diligence process with you at
16 all?

17 A. No.

18 Q. Have you, as an expert witness,
19 heard the term work product as relating to
20 lawyers?

21 A. Yes.

22 Q. Did you receive any work product
23 from your counsel in connection with your work
24 on the Adams Golf engagement?

25 A. No.

1 EDWARD NECARSULMER, III

2 Q. Let me turn to the report, 321.

3 Just some basic things. I see that you have
4 listed your hourly rate as \$600 per hour. Is
5 that the current rate?

6 A. That is accurate.

7 Q. Am I correct that in 2004 it was
8 \$450, back in the AMF case?

9 A. That's correct.

10 Q. When did the rate change?

11 A. In 2005.

12 Q. What was the circumstance of
13 that?

14 A. I was discussing being retained
15 in another case and discussed the going rate and
16 was informed that \$600 was a fair rate.

17 Q. In Paragraph 3 of the report, in
18 the category of Prior Testimony, you write: "I
19 am also currently retained as an expert in a
20 matter before the United States District Court
21 in the Northern District of Texas."

22 What is that matter, in general
23 terms?

24 A. It is a -- it's a similar type
25 of case. The company is called Flowserve, and

1 EDWARD NECARSULMER, III

2 it is plaintiffs coming after the company and
3 underwriter defendants based on a number of
4 issues which due diligence is one.

5 Q. And what underwriters have
6 retained you in that case?

7 A. The --

8 MR. GLUCKOW: Objection to the
9 form. It assumes facts not in
10 evidence.

11 MR. LEWIS: I'll withdraw the
12 question.

13 BY MR. LEWIS:

14 Q. Who has retained you in that
15 case?

16 A. The firm of Jenkins & Gilchrist.

17 Q. And what underwriters are the
18 defendants in that case whose due diligence,
19 among other things, you are considering?

20 A. CSFB and Banc of America
21 Securities.

22 Q. Have you yet rendered any
23 opinions in that case?

24 A. I have not.

25 Q. Have you testified in that case?

1 EDWARD NECARSULMER, III

2 A. I have not.

3 Q. Have you -- as a technical
4 matter, have you yet been found by any court
5 either qualified or unqualified to render an
6 expert witness opinion on any subject?

7 MR. GLUCKOW: Objection to the
8 form.

9 You can answer.

10 THE WITNESS: No.

11 BY MR. LEWIS:

12 Q. Have you ever been retained as
13 an expert on matters of disclosure?

14 MR. GLUCKOW: Objection to the
15 form.

16 You can answer.

17 THE WITNESS: Not specifically.

18 The assignment is usually phrased as
19 due diligence; however, you tend to get
20 asked whether the due diligence led to
21 the proper disclosure.

22 BY MR. LEWIS:

23 Q. Have you ever, other than in
24 this present litigation, included an opinion in
25 one of your reports on the subject of whether

1 EDWARD NECARSULMER, III
2 something should have been disclosed as a result
3 of due diligence?

4 MR. GLUCKOW: Objection to the
5 form.

6 I think you've already
7 established the only other report is
8 the Exhibit 324.

9 But you can answer.

10 THE WITNESS: No.

11 BY MR. LEWIS:

12 Q. I note in your description of
13 your experience that both presently and between
14 March of '98 and May of 2000 you have acted as a
15 consultant to the financial services industry.
16 Is that fair?

17 MR. GLUCKOW: Just for the record
18 here, you are looking at what now?

19 MR. LEWIS: I'm looking at
20 Exhibit A to Court Exhibit 321, and
21 this is the part that includes
22 Mr. Necarsulmer's CV or biography.

23 BY MR. LEWIS:

24 Q. Am I correct that between March
25 of 1998 and May 2000 you were a consultant to

1 EDWARD NECARSULMER, III

2 the financial services industry?

3 A. Yes.

4 Q. And also between May of 2002 and
5 the present you have been a consultant to that
6 industry --

7 A. That is correct.

8 Q. -- is that fair?

9 In the course of your work as a
10 consultant, have you been asked by any
11 underwriters to render them an opinion outside
12 of court on whether something they did in due
13 diligence was appropriate or inappropriate?

14 A. No. The scope of my work, just
15 if it's useful, the scope of my work has
16 traditionally been -- and I don't do much of it
17 anymore -- has been an operating practice,
18 should we -- how do we organize a sales group,
19 how do we organize a research group, will this
20 client's -- things like that.

21 Q. So in what -- I'll try to ask
22 this fairly.

23 In the course of your career in
24 the financial industry, leaving aside your
25 expert witness work of the last several years,

1 EDWARD NECARSULMER, III

2 have you been called upon to evaluate due
3 diligence investigations?

4 A. Absolutely.

5 Q. And when did that -- when was
6 that first the case in your practice?

7 A. Through my whole career, I
8 mean. Either as practitioner or running a deal,
9 but most importantly as a commitment committee
10 chair or member, which I did for a number of
11 years, the heart of the work was evaluating your
12 own investment banker's due diligence or if you
13 were comanager, the due diligence done by
14 whoever was the book-running manager, so that
15 was a significant part of certainly the last 20
16 years of my career in banking.

17 Q. Just by way of terminology, you
18 used the phrase book-running manager. Can you
19 explain what you mean by that?

20 A. In virtually all offerings one
21 manager -- one of the underwriters -- one of the
22 managing underwriters is designated as the book
23 runner and he will be the responsible party.
24 Like Lehman was in this situation versus what a
25 Banc of America -- Nations Banc I guess in this

1 EDWARD NECARSULMER, III
2 case or a Ferris Baker Watts did, they were
3 comanagers. So the primary responsibility is
4 based on the -- is in the arms of the
5 book-running manager.

6 Q. So were there times while you
7 were working in the industry, say, on the
8 commitment committee that you had to send your
9 investment banking team back to do more due
10 diligence on a subject?

11 A. Absolutely.

12 Q. Have you ever authored any
13 publications with respect to due diligence
14 investigations?

15 MR. GLUCKOW: Object to the form.
16 You can answer.

17 THE WITNESS: Not external, not
18 things for general use. I certainly
19 was part of, in firms, making sure that
20 our standard due diligence procedure,
21 adding and editing to that, but nothing
22 for external use.

23 BY MR. LEWIS:

24 Q. You helped create standard due
25 diligence procedures for one or more firms?

1 EDWARD NECARSULMER, III

2 A. Yes.

3 Q. Which firms were they?

4 A. For CJ Lawrence, which then
5 became Morgan Grenfell and then became Deutsche
6 Bank.

7 And Wasserstein Perella, I
8 certainly didn't create it, but as head of the
9 equity area I altered it to meet my own
10 practices and standards.

11 Q. In the course of your work in
12 the financial industry, did you ever receive any
13 legal training?

14 A. None.

15 Q. Did you ever teach due diligence?

16 A. Let me make sure I phrase this
17 properly.

18 Particularly in my Deutsche
19 Bank life, we had a significant number of
20 training classes, whether they were for MBAs
21 or for people from other parts of the world,
22 and I would do -- I would usually run the
23 equity capital markets classes. Due diligence
24 was certainly a part of that, would be a
25 subject underneath the general heading of

1 EDWARD NECARSULMER, III
2 investment banking or equity capital markets
3 and that would be my responsibility.

4 Q. As best you can recall it,
5 sitting here today, what in general did you --
6 by way of materials did you present to your
7 instructees about due diligence?

8 MR. GLUCKOW: You are asking him
9 to recall the sum and substance of the
10 lectures?

11 BY MR. LEWIS:

12 Q. Not the sum and substance, but
13 the nature of the materials that were given.
14 Were they case studies in due diligence, were
15 they outlines of or checklists, were they
16 discussions of cases, discussions of industry
17 standards? What, in general, did you present
18 when you were teaching due diligence?

19 MR. GLUCKOW: Objection to the
20 form.

21 You can answer.

22 THE WITNESS: I would usually
23 include the most recent checklist that
24 the firm -- the appropriate firm was
25 using, and I might have some discussion

1 EDWARD NECARSULMER, III
2 of how industry standards might have
3 changed or might be at the moment, but
4 I'm really not -- can't be any more
5 specific than that.

6 BY MR. LEWIS:

7 Q. Do you recall whether the
8 checklist was annotated with legal authorities?

9 MR. GLUCKOW: Objection to the
10 form.

11 You can answer.

12 THE WITNESS: No.

13 BY MR. LEWIS:

14 Q. Since I didn't ask the question
15 very well, I'm not sure whether you don't recall
16 whether it was, or recall that it wasn't. To
17 the best of your knowledge, did you provide your
18 instructees with a checklist that was keyed to
19 cases --

20 A. No.

21 Q. -- that established
22 requirements?

23 I ask you to look to Paragraph
24 B on Page 2 of Exhibit 321. In the middle of
25 the paragraph you use the phrase: "Although

1 EDWARD NECARSULMER, III
2 the registration statement is the issuer's,
3 the underwriting team," dash, "including its
4 counsel is also responsible for the
5 completeness, materiality, and veracity of
6 this information."

7 Why do you say that the
8 registration statement is the issuer's?

9 A. It's a fact. They file it, they
10 are the only ones who could make changes to it,
11 respond to comments.

12 Q. Okay. Have you ever heard
13 anyone express the view that as a matter of law
14 under the 1933 Act that both the underwriters
15 and the issuer are equally legally responsible
16 for the content of the document subject to the
17 due diligence defense?

18 MR. GLUCKOW: Objection to the
19 form. Calls for a legal conclusion.

20 You can answer.

21 THE WITNESS: I do understand
22 that. I guess my response would be to
23 the first -- back to the first part of
24 what the question is, as a matter of
25 business practice, the registration

1 EDWARD NECARSULMER, III
2 statement, and certainly in the many
3 deals that I've worked on, is the
4 issuer's document. Issuer's counsel,
5 you know, is the first name on the
6 agents for service. It's just the way
7 things are done.

8 BY MR. LEWIS:

9 Q. If you would just look for a
10 second and maybe keep by you the report from the
11 AMF litigation, Exhibit 324.

12 If you look to the same
13 Paragraph B in that report, you will see there
14 is no -- unless I miss it -- statement in that
15 paragraph to the effect that the registration
16 statement is the issuer's.

17 MR. GLUCKOW: You mean those
18 words are not in Exhibit 324?

19 MR. LEWIS: They are not on it.
20 Not that I see.

21 MR. GLUCKOW: The document speaks
22 for itself.

23 MR. LEWIS: Correct me if it's
24 somewhere else.

25 MR. GLUCKOW: Is there a

1 EDWARD NECARSULMER, III

2 question?

3 BY MR. LEWIS:

4 Q. Well, was there some reason that
5 you added that reference -- strike that.

6 Is there some reason that in
7 writing your report in this litigation you
8 felt it useful to include a reference that the
9 registration statement is the issuer's?

10 A. There's no particular reason.
11 These are conclusions that I drew from reading
12 the material and thought that they were
13 relevant.

14 Q. Getting back to 321 at Paragraph
15 6 on Page 3, describing the due diligence
16 process in this case, you write: "The process
17 was enhanced by the book-running firm's
18 commitment process. A complete memo was
19 prepared and presented to a group of senior firm
20 members. This group further reviewed and
21 validated the deal team's due diligence
22 efforts."

23 MR. GLUCKOW: Excuse me. If you
24 wouldn't mind, I think you lost the
25 witness in terms of where you were

1 EDWARD NECARSULMER, III
2 reading from. Would you mind going
3 back and redirecting us to where you
4 are.

5 MR. LEWIS: We are on Page 3,
6 Paragraph 6.

7 MR. GLUCKOW: And we are on 321;
8 correct?

9 MR. LEWIS: Right, 321.

10 BY MR. LEWIS:

11 Q. "The process was enhanced by the
12 book-running firm's commitment process. A
13 complete memo was prepared and presented to a
14 group of senior firm members. This group
15 further reviewed and validated the deal team's
16 due diligence efforts."

17 When you wrote that, were you
18 referring to the commitment memo that appears
19 at Exhibit 74?

20 A. Yes.

21 MR. GLUCKOW: When you said --
22 just for the record, I'm assuming your
23 question is referring to the complete
24 memo as opposed to the process referred
25 to in Paragraph 6?

1 EDWARD NECARSULMER, III

2 MR. LEWIS: Right.

3 BY MR. LEWIS:

4 Q. Exhibit 74 is the complete memo
5 that you referred to in Paragraph 6?

6 A. To the best of my recollection.

7 Q. Did you receive any information
8 from Lehman about the commitment process other
9 than appears in the documents that are listed in
10 your report?

11 A. No.

12 Q. Did you read Exhibit 74 from
13 cover to cover in the process of your work on
14 this case?

15 A. Yes.

16 Q. Did you find someplace in
17 Exhibit 74 where there is reference to either
18 potential gray marketing or to potential Costco
19 distribution?

20 A. Not that I recall.

21 Q. Do you have any reason to
22 believe that either gray marketing or Costco
23 distribution were mentioned orally to the
24 commitment committee, although those terms don't
25 appear in the memo?

1 EDWARD NECARSULMER, III

2 A. I wouldn't know.

3 Q. From your experience working in
4 the industry, would you expect that the
5 commitment committee would be provided with
6 facts at a commitment committee meeting that did
7 not appear in the memorandum that was being
8 presented to them?

9 MR. GLUCKOW: Objection. Calls
10 for speculation.

11 You can answer.

12 THE WITNESS: I just wasn't
13 there. Certainly, from a practice
14 matter, you might ask questions -- you
15 do ask questions; you frankly grill the
16 team -- the presenters. That's the
17 process.

18 BY MR. LEWIS:

19 Q. What is the purpose of a
20 commitment committee memorandum, as you
21 understand it?

22 A. It's really to generally
23 familiarize people who are not actively involved
24 with the transaction as to what they are going
25 to hear, the subject, and, maybe, hopefully --

1 EDWARD NECARSULMER, III

2 it doesn't always work this way -- they'll think
3 about it before they walk in the door.

4 Q. The "they" being the commitment
5 committee itself?

6 A. The commitment committee,
7 correct.

8 Q. Now, getting to Paragraph 7 of
9 your report, which includes a summary of your
10 opinions -- this is Paragraph 7, Summary, Page
11 4, the next page. Let me take this in pieces.

12 The first sentence reads:

13 "Based on my long industry experience and the
14 information presented to me, it is my opinion
15 that the underwriters of this offering
16 performed due diligence in line with normal
17 industry standards and practice."

18 Can you explain to me, sir,
19 what you mean by "in line with normal industry
20 standards and practice"?

21 A. The years of experience that I
22 had actually doing this leads me to believe --
23 leads me to think I understand, you know, what
24 is required and what is expected for the
25 process, and when I opine that it's in line with

1 EDWARD NECARSULMER, III

2 that, it means simply that, that I think they
3 complied with what I think is necessary to have
4 complete due diligence.

5 Q. Are the industry standards that
6 you refer to in your opinion something that is
7 written down in some industry publication or
8 guideline?

9 A. It's business practice.

10 Q. An actual business practice that
11 you have observed in your years of working in
12 the financial industry, correct?

13 A. Yes.

14 Q. That experience was gained at
15 the firms that are mentioned -- that you've
16 already mentioned in your testimony and also
17 Hallgarten, H-A-L-L-G-A-R-T-E-N, and Company?

18 A. Yes.

19 Q. Hallgarten and Company was at
20 one point Moseley and Hallgarten?

21 A. Actually, the opposite.
22 Hallgarten and Company was a firm of which there
23 were a great number. It was actually founded in
24 1850 and had a significant business but then
25 became part of Moseley and Hallgarten, and there

1 EDWARD NECARSULMER, III
2 was a period in the '70s when there was a huge
3 conglomeration of firms.

4 Actually, I did a fair amount
5 of due diligence where I was the guy who
6 actually went and visited the factory at that
7 point in my career.

8 Q. Opened the boxes?

9 A. Correct.

10 Q. Now, the next sentence of your
11 opinion, immediately following the one I read
12 previously, reads: "Their actions were
13 consistent with a standard of reasonableness as
14 I understand it, and were more than sufficient
15 to satisfy me as to their adequacy and
16 completeness."

17 Again, words are the heart of all
18 depositions, I guess. What do you mean by "a
19 standard of reasonableness as I understand it"?

20 A. As we've already established, I
21 have no legal training, but it's certainly my
22 business understanding or concept that the
23 underwriters are supposed to conduct reasonable
24 due diligence, and, again, in compliance with
25 what I've done in my own career, I've felt and

1 EDWARD NECARSULMER, III
2 feel that this meets those standards -- that
3 their efforts meet those standards. Let me
4 phrase that better.

5 Q. The standard that you refer to
6 then in that sentence is a standard based on
7 your empirical observation and personal work in
8 the financial industry rather than anything that
9 is written down in text anywhere?

10 MR. GLUCKOW: Objection to the
11 form.

12 You can answer.

13 THE WITNESS: Yes.

14 BY MR. LEWIS:

15 Q. Have you been a member of any
16 industry committees or associations at which
17 representatives of underwriting firms sit down
18 to discuss principles of due diligence?

19 A. I've participated in numerous
20 industry panels and study groups and the like,
21 commented on rules, changing the department of
22 corporate financing's rules, et cetera. Due
23 diligence is certainly part of it, but I
24 couldn't cite you a time when I attended a
25 special seminar on due diligence, but I was an

1 EDWARD NECARSULMER, III
2 active participant in Securities Industry
3 Association, Investment Bankers Association,
4 NASD, Group of Corporate Finance, I did a lot of
5 that kind of thing, yes.

6 Q. You believe you've at least
7 heard people talk at such meetings, in such
8 context about due diligence?

9 A. I do.

10 Q. Have you read any publications
11 about due diligence?

12 MR. GLUCKOW: Ever?

13 MR. LEWIS: Ever.

14 THE WITNESS: Yes, but I can't
15 really recall -- I can't cite any, but
16 I know that I've done so.

17 BY MR. LEWIS:

18 Q. Do you recall anything you've
19 seen in writing about due diligence in the last
20 five years?

21 MR. GLUCKOW: Object to the form.
22 You can answer.

23 THE WITNESS: No.

24 BY MR. LEWIS:

25 Q. In the first sentence of this

1 EDWARD NECARSULMER, III
2 summary you refer to the underwriters of this
3 offering having performed due diligence in line
4 with normal industry standards and practice.

5 Are you referring there to
6 Lehman Brothers rather than to Ferris Baker
7 Watts or Nations Banc?

8 A. I'm referring to all three
9 managers.

10 Q. Do you believe that the
11 underwriters other than Lehman Brothers
12 satisfied their due diligence by delegating that
13 function to Lehman which, in your view,
14 satisfactorily performed it?

15 MR. GLUCKOW: Objection to form.

16 Assumes facts not in evidence.

17 Mischaracterizes the testimony.

18 You can answer.

19 THE WITNESS: I don't believe
20 they -- look, the practical reality is
21 that the managing underwriter is
22 responsible for the process, but I
23 think there's ample reference to the
24 fact that the other firms kept their
25 own files, participated in various

1 EDWARD NECARSULMER, III

2 parts of this, were present at
3 meetings, so I would not use the word
4 -- I think the word you used was
5 advocated or --

6 BY MR. LEWIS:

7 Q. Delegated.

8 A. Delegated, I think to the extent
9 that it's industry standard to clearly delegate
10 the lead to the book-running manager, but I
11 think they performed in line with what I would
12 have expected.

13 Q. What were you referring to with
14 respect to the other underwriters keeping their
15 own files?

16 A. I have production from Nations
17 Banc; I've seen some of their work; I've seen
18 the fact that they participated in meetings.

19 Q. As part of the overall
20 Underwriter Defendants Document Production Pages
21 1 to 11636?

22 A. That's correct.

23 Q. Can you recall anything that
24 Nations Banc did with respect to an evaluation
25 of possible gray marketing or Costco

1 EDWARD NECARSULMER, III

2 distribution of Adams clubs?

3 A. No.

4 Q. Can you recall anything that
5 Ferris Baker Watts did with respect to gray
6 marketing or possible Costco distribution of
7 Adams clubs?

8 A. No.

9 Q. Just to be clear in terms of
10 your reading, have you ever read case law
11 regarding the legal standards for due diligence?

12 MR. GLUCKOW: Object to the form.
13 You can answer.

14 THE WITNESS: Not that I recall.

15 BY MR. LEWIS:

16 Q. Have you heard of any cases,
17 legal cases, in the field of due diligence that
18 you consider to be important cases?

19 A. No.

20 Q. Have you ever heard of a
21 decision in a case called Escott, E-S-C-O-T-T,
22 versus Bar Chris, B-A-R capital C-H-R-I-S?

23 A. I've heard of the case, but it
24 was in an earlier time.

25 Q. Have you heard of a decision in

1 EDWARD NECARSULMER, III

2 Feit, F-E-I-T, versus Leasco, L-E-A-S-C-O, by
3 Judge Weinstein?

4 A. No.

5 Q. Have you heard that a decision
6 was rendered in the Worldcom litigation by Judge
7 Denise Cote, C-O-T-E, on the subject of due
8 diligence?

9 A. Yes.

10 Q. Have you read that decision?

11 A. I have not.

12 Q. Have you been told anything
13 about the contents of the decision?

14 A. Only what I've read.

15 Q. And what have you read?

16 A. Just in terms of general press
17 coverage of the matter.

18 Q. Do you know any principles that
19 she referred to in her opinion?

20 A. No.

21 Q. Would you agree with the general
22 proposition -- and, please, if you don't agree,
23 tell me -- that over the years the underwriter
24 has been regarded as a type of gatekeeper to the
25 capital marketplace?

1 EDWARD NECARSULMER, III

2 MR. GLUCKOW: Object to the form.

3 You can answer.

4 THE WITNESS: Yes.

5 BY MR. LEWIS:

6 Q. You do agree with that?

7 A. I do.

8 Q. And would you agree that an
9 underwriter's reputation has helped small
10 companies gain access to capital markets?

11 MR. GLUCKOW: Object to the form.

12 You can answer.

13 THE WITNESS: Yes.

14 BY MR. LEWIS:

15 Q. Do you believe that it is true
16 that underwriters have been considered
17 responsible for assuring the accuracy of an
18 issuer's offering materials?

19 A. I don't believe that to be true.

20 Q. And can you tell me why?

21 A. I think among -- let me make
22 sure I phrase this properly. I think among
23 sophisticated investors, it's well-known that
24 the company is, in fact, you know, the better
25 source about its business and that underwriters

1 EDWARD NECARSULMER, III

2 will certainly do -- are certainly important in
3 the process; but I don't believe that it's -- it
4 completely -- that it's generally recognized
5 that that is part of the underwriters'
6 responsibility.

7 Q. Do you believe that in initial
8 public offerings underwriters are heavily relied
9 upon by the investing public?

10 A. I do believe that.

11 Q. Do you believe that's true
12 especially where the companies doing the IPOs
13 are experiencing rapid growth and change just
14 before the IPO?

15 MR. GLUCKOW: Object to the form.
16 You can answer.

17 THE WITNESS: I don't think
18 there's any difference from your last
19 question. I think your last question
20 is true, I wouldn't modify it.

21 BY MR. LEWIS:

22 Q. Okay.

23 A. The first question is true,
24 excuse me.

25 Q. Do you agree that the

1 EDWARD NECARSULMER, III

2 reasonableness of a due diligence investigation
3 varies with the factual circumstances of each
4 offering?

5 A. I do.

6 Q. To what extent do you believe
7 expense is a determinant in how thorough due
8 diligence should be?

9 MR. GLUCKOW: Object to the form.
10 You can answer.

11 THE WITNESS: Virtually not at
12 all.

13 BY MR. LEWIS:

14 Q. And why is that?

15 A. I think people's reputation and
16 their relationship with their clients -- I'm
17 talking about from an underwriter's point of
18 view now -- is priceless and cost, just for
19 better or worse, was never an issue.

20 Q. Now, do you believe that in the
21 securities industry the standards for due
22 diligence are more rigorous in an IPO than in a
23 follow-on offer?

24 MR. GLUCKOW: Object to the form.
25 You can answer.

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1 EDWARD NECARSULMER, III

2 THE WITNESS: I have a difficult
3 -- I think your concept is correct, but
4 I'm not sure rigorous -- I guess what
5 I'm trying to say is since there is
6 less information in the public domain,
7 more work is traditionally done, but I
8 think the standards are pretty much the
9 same.

10 BY MR. LEWIS:

11 Q. So the standards are the same
12 but the work is more rigorous in the IPO than in
13 the follow-on offerings?

14 MR. GLUCKOW: Object to the
15 form. Mischaracterizes the testimony.
16 You can answer.

17 THE WITNESS: What I'm trying to
18 say -- maybe I didn't say it properly
19 -- is that if you are working on the
20 second, third, or fourth offering for a
21 company, A, you are knowledgeable,
22 assuming you have the same team in
23 place or parts of the same team in
24 place; and, B, the body of information
25 has been organized and is more easily

1 EDWARD NECARSULMER, III

2 -- easy to digest and to process. An
3 IPO you tend -- sometimes have to
4 really break new ground to get
5 information.

6 BY MR. LEWIS:

7 Q. Would you agree that the
8 securities industry as a whole expects more due
9 diligence work in an IPO than in a follow-on
10 offering?

11 MR. GLUCKOW: Object to the
12 form. Vague and ambiguous.

13 You can answer.

14 THE WITNESS: I wouldn't agree to
15 that.

16 BY MR. LEWIS:

17 Q. I think -- strike that.

18 Is it true in an IPO that
19 because securities have not been previously
20 publicly traded, information about an issuer
21 is often not readily available to the public
22 as a whole?

23 MR. GLUCKOW: Object to the form.

24 You can answer.

25 THE WITNESS: It's too hard to

1 EDWARD NECARSULMER, III
2 generalize. I mean, Google, there were
3 no secrets, yet I'm sure on some small
4 companies there are secrets, or that
5 may be the wrong way to phrase it, but
6 information that is not as available.

7 BY MR. LEWIS:

8 Q. Would you disagree then that the
9 standards for due diligence are higher than
10 usual where a company going through an IPO is
11 experiencing rapid growth and change?

12 MR. GLUCKOW: Objection to the
13 form.

14 You can answer.

15 It's vague and ambiguous.

16 THE WITNESS: I don't think I can
17 answer. I'm not unwilling to, I just
18 don't think I can answer that. I don't
19 think the standards -- you are faced
20 with the same issue when you agree to
21 commit your capital and your reputation
22 to underwrite securities and there may
23 be a number of, you know, intensity, or
24 whatever the proper phrase would be,
25 someplace within the same scale and I

1 EDWARD NECARSULMER, III
2 don't think it's just because it's an
3 initial public offering or just because
4 it's a company that's a rapidly growing
5 company.

6 BY MR. LEWIS:

7 Q. So in the past when you -- I
8 take it you have performed -- you have
9 participated in some way or other in due
10 diligence investigations both of companies going
11 through IPOs and companies going through
12 follow-on offerings. Is that correct?

13 A. That is correct.

14 Q. And in those situations you did
15 not expect the due diligence team to adjust its
16 level of due diligence to take into account the
17 newness of the one company versus the previous
18 offering of the other?

19 MR. GLUCKOW: Object to the
20 form. Mischaracterizes the testimony.

21 You can answer.

22 THE WITNESS: I don't think
23 that's what I said, or if I did say
24 that, that's not what I meant. What I
25 meant was there are a whole set of

1 EDWARD NECARSULMER, III
2 variables. Some of the ones you've
3 mentioned are variables -- are valid
4 ones, but there are -- just the
5 existence of the fact that it was a
6 fast growing company or it was a new
7 company would not be enough for me to
8 direct the team to do something
9 different.

10 BY MR. LEWIS:

11 Q. What variables, if any, would
12 cause you to direct the team to do something
13 different in due diligence?

14 MR. GLUCKOW: I'm going to object
15 to the form and object on the ground
16 that it's vague and ambiguous and quite
17 overbroad.

18 But you can answer.

19 THE WITNESS: I mean it's a
20 situation-by-situation issue. I think
21 that -- and I can only, you know,
22 really respond to it anecdotally if I
23 can think of some appropriate
24 anecdotes. But I guess my point is,
25 without belaboring this, is you look at

1 EDWARD NECARSULMER, III
2 each situation and hopefully -- you
3 know, if you are managing the process,
4 you look at each situation and
5 hopefully you figure out, you know,
6 what you need to do to satisfy your
7 commitment committee, yourself, and the
8 marketplace. And there are really no
9 other rules specific -- you know,
10 templates I can honestly look at you
11 and offer beyond that.

12 BY MR. LEWIS:

13 Q. Have you ever had the experience
14 of adjusting the due diligence that you were
15 conducting on a company because the company had
16 management that had not had long experience in
17 running a public company?

18 A. Yes.

19 Q. And why did you do that?

20 A. Well, because simply as a matter
21 of mechanics. In many cases if a company had
22 done other offerings or was -- let's say had
23 done other offerings or had significant -- had
24 done private equity financings or other
25 transactions, typically they might be more

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2 organized in terms of your ability to get
3 documents and things that were on point that
4 would go right to your organizational outline,
5 where if they hadn't, you might have to really
6 help them set up the process.

7 Q. Would you agree that in an
8 initial public offering there is a strong
9 affirmative duty of disclosure?

10 MR. GLUCKOW: Object to the
11 form. Vague and ambiguous. Calls for
12 a legal conclusion.

13 You can answer.

14 THE WITNESS: Yes.

15 BY MR. LEWIS:

16 Q. Would you agree that in
17 conducting due diligence it is necessary for the
18 due diligence team to continue its investigation
19 of the issuer up to and including the effective
20 date of the registration statement?

21 A. Yes.

22 Q. And a due diligence
23 investigation would be inadequate if the
24 underwriter did not do that?

25 MR. GLUCKOW: Object to the

1 EDWARD NECARSULMER, III

2 form. It calls for a legal conclusion.

3 You can answer.

4 THE WITNESS: I mean, the easy

5 answer is yes, but -- well, okay, let

6 me just leave it at yes.

7 BY MR. LEWIS:

8 Q. Is it your understanding as a

9 non-lawyer that one of the duties of

10 underwriters is to deal fairly with the

11 investing public?

12 MR. GLUCKOW: Object to the form.

13 You can answer.

14 THE WITNESS: Absolutely.

15 BY MR. LEWIS:

16 Q. Isn't that sometimes referred to

17 as the shingle theory?

18 A. I'm not familiar with that.

19 Q. I take it from your initial

20 report that one of your beliefs is that an

21 underwriter has an obligation to conduct a

22 reasonable investigation in an IPO?

23 A. Yes.

24 Q. And there is a long tradition

25 since the securities laws were enacted in the

1 EDWARD NECARSULMER, III

2 '30s of underwriters conducting due diligence
3 investigations?

4 MR. GLUCKOW: Object to the
5 form. Vague and ambiguous.

6 You can answer.

7 THE WITNESS: Yes.

8 BY MR. LEWIS:

9 Q. To your knowledge, how far back
10 in time have due diligence investigations been
11 conducted by underwriters?

12 A. I think they were formalized by
13 the 33 Act, but I don't go back quite that far,
14 but it's certainly my understanding that
15 particularly, you know, throughout history, you
16 know, you committed your own capital to a
17 greater extent I think than -- now things come
18 full cycle, but in the beginning I think people
19 did due diligence as, you know -- it's my
20 understanding that a lot of due diligence --
21 what due diligence was done was, in fact, you
22 know, a matter of, you know, of self-protection
23 as opposed to any responsibility -- as opposed
24 to exclusively a responsibility to, you know,
25 investors.

1 EDWARD NECARSULMER, III

2 Q. Did your work in the securities
3 industry begin in 1967 with Hallgarten?

4 A. Correct.

5 Q. In the time that you've been in
6 the industry, have you become aware of any
7 changes in practical standards for due diligence
8 investigations?

9 MR. GLUCKOW: Objection. Vague
10 and ambiguous. Overbroad.

11 You can answer.

12 BY MR. LEWIS:

13 Q. Let me reframe the question.

14 Have you become aware of
15 changes in practice with respect to due
16 diligence investigations over the time since
17 1967 that you've been employed in the
18 industry?

19 MR. GLUCKOW: The same objection.
20 You can answer.

21 THE WITNESS: None to the basic
22 tenets of how the business or the
23 process is done. I think one of the
24 main changes that I've seen is that to
25 the extent that the managing

1 EDWARD NECARSULMER, III
2 underwriter has taken an even larger
3 responsibility or has been delegated --
4 I don't like the word delegated, but
5 has been delegated a responsibility by
6 the other comanagers to a greater
7 extent.

8 And the other -- if I can just
9 illuminate. The process has gotten
10 better to the extent that investment
11 banks began to specialize in either
12 certain industries or had groups that
13 did certain industries; whereas, in my
14 life, everybody was a generalist and so
15 that if you were doing a
16 telecommunications deal, it would be
17 done by the telecommunications group in
18 Lehman Brothers or Goldman Sachs or
19 something, who really became quite
20 expert.

21 I know we had a significant
22 technology practice and management
23 would often tell me that some of the
24 people in that group are as
25 knowledgeable -- not as they were, of

1 EDWARD NECARSULMER, III

2 course, but as their competitors were
3 about the business.

4 MR. GLUCKOW: I think we've been
5 going a little bit over an hour. If
6 there's a point in your outline where
7 we could take a short break.

8 MR. LEWIS: We can take it right
9 now.

10 MR. GLUCKOW: That would be
11 great.

12 (A recess was had from 1:18 p.m.
13 to 1:26 p.m.; and then the proceedings
14 continued as follows:)

15 BY MR. LEWIS:

16 Q. Mr. Necarsulmer, outside of this
17 litigation, before you did your work in this
18 case, did you ever hear it said that
19 underwriters were required to act as a prudent
20 man would in the management of his own property?

21 MR. GLUCKOW: Those words?

22 MR. LEWIS: Yes.

23 THE WITNESS: I've certainly
24 heard of the prudent man rule, but I
25 thought it referred to trust companies

1 EDWARD NECARSULMER, III

2 and mutual funds.

3 BY MR. LEWIS:

4 Q. Okay. Have you heard anything
5 else said about whether underwriters had to act
6 as a prudent man in the management of his own
7 property?

8 A. I've never heard that.

9 Q. Do you believe that underwriters
10 are entitled to rely solely on the
11 representations of a company's officers or
12 counsel?

13 MR. GLUCKOW: Object to the form.
14 You can answer.

15 THE WITNESS: No.

16 BY MR. LEWIS:

17 Q. And why do you not believe that
18 they can do so?

19 A. In my experience, when possible,
20 and when relevant, it always -- it wasn't always
21 the case. If there are independent checks, you
22 can do formal or informal, it's a useful part of
23 the process.

24 Q. Do you believe that verification
25 of information is a critical step in the due

1 EDWARD NECARSULMER, III

2 diligence process?

3 A. Yes.

4 Q. And do you believe that that is
5 necessary because even honest clients can make
6 mistakes?

7 MR. GLUCKOW: Objection to the
8 form.

9 You can answer.

10 BY MR. LEWIS:

11 Q. Do you believe that one reason
12 that verification is necessary is because even
13 honest clients can make mistakes?

14 MR. GLUCKOW: Same objection.

15 You can answer.

16 THE WITNESS: Yes. I don't
17 enthusiastically agree, but I will
18 concede that.

19 BY MR. LEWIS:

20 Q. Okay. Do you agree that another
21 reason that it may be necessary is because
22 honest clients can be overenthusiastic or
23 overoptimistic?

24 A. Yes.

25 MR. GLUCKOW: The "it" being

1 EDWARD NECARSULMER, III
2 verification?

3 MR. LEWIS: Yes.

4 BY MR. LEWIS:

5 Q. And is it your belief that on
6 rare occasions statements may be made by company
7 officers to induce an underwriter to underwrite
8 an offering where those statements are
9 deliberately false?

10 MR. GLUCKOW: Objection to the
11 form. Vague and ambiguous.

12 You can answer.

13 THE WITNESS: It certainly has
14 happened.

15 BY MR. LEWIS:

16 Q. Can you think of any situations
17 where it has happened?

18 MR. GLUCKOW: In his own
19 experience?

20 BY MR. LEWIS:

21 Q. Either in your own experience or
22 those you have heard of?

23 A. I can't give you a specific
24 example.

25 Q. Do you agree with the

1 EDWARD NECARSULMER, III

2 proposition that underwriters must be alert to
3 exaggerations by an issuer?

4 MR. GLUCKOW: Object to the form
5 and object to the ground that like
6 these other questions, that it's vague
7 and ambiguous and overbroad.

8 But you can answer.

9 THE WITNESS: Yes.

10 BY MR. LEWIS:

11 Q. Now, do you believe that there
12 are any industry standards relating to
13 verification of information supplied by an
14 issuer?

15 A. No.

16 MR. GLUCKOW: I offer a belated
17 objection to the form.

18 BY MR. LEWIS:

19 Q. Have there been instances in
20 your career where to verify information you or
21 people working for you interviewed lower level
22 employees of a corporation?

23 A. I can't answer that yes or no.
24 I've seen it done, not in a verification sense,
25 but if I may, for example, in a business where

1 EDWARD NECARSULMER, III
2 one particular product line, geographic line,
3 factory is critical or critical to driving
4 growth of sales and revenues, I've seen it done
5 where you've asked to be exposed to the actual
6 hands-on people in that area, but it's not
7 customary, except for, again, you might meet a
8 plant manager if you go look at a facility, that
9 kind of thing, but he would more be a tour guide
10 and you would generally speak to the designated
11 heads of marketing, finance, manufacturing,
12 whatever the traditional department heads of the
13 company are. That's certainly my experience.

14 Q. In the instances you gave of
15 dealing with lower level employees, would it be
16 fair to say you were giving examples of
17 situations where the contacts were made for
18 evaluation of those people or examination of
19 facilities?

20 MR. GLUCKOW: Objection to the
21 form.

22 You can answer.

23 THE WITNESS: The latter, not the
24 former.

25 BY MR. LEWIS:

1 EDWARD NECARSULMER, III

2 Q. Okay. But not as a verification
3 on information that had been supplied by
4 management?

5 A. Correct.

6 Q. Have there been instances in
7 your career when either in participating in or
8 conducting a due diligence investigation you
9 asked a company to give you access to files that
10 they had not provided to you?

11 A. I don't recall ever having done
12 that.

13 Q. Do you believe that use of
14 industry experts in due diligence is a desirable
15 thing in general terms?

16 A. Yes, with a qualification. I
17 think it's important to -- I think it's
18 important when there's something you don't
19 understand -- or, again, I'm a practical
20 character, so I can remember working on an
21 insurance company deal where there's no way we
22 would be able to understand actuarial
23 assumptions, so we would hire our own actuary.

24 But would I encourage the use
25 of an outside expert to look at somebody's

1 EDWARD NECARSULMER, III
2 manufacturing process or something? Typically
3 not. So oil and gas is the usual example
4 where you get your independent petroleum
5 engineer to verify reserves, or something like
6 that.

7 Q. Do you believe that there are
8 instances in which verification may require
9 reviewing internal documents of a company that
10 the company has not voluntarily supplied?

11 MR. GLUCKOW: Object to the form.
12 You can answer.

13 THE WITNESS: I'm not really
14 comfortable with the hypothetical. I'm
15 sure there are situations, I just have
16 never run into one.

17 BY MR. LEWIS:

18 Q. Do you believe that it's true
19 that during the due diligence process the
20 positions of the underwriters and the company's
21 officers should become somewhat adverse?

22 MR. GLUCKOW: Object to the form.
23 You can answer.

24 THE WITNESS: In an ideal world
25 there ought to be a nice balance

1 EDWARD NECARSULMER, III
2 between friendly or, you know,
3 cooperation, but you still need to have
4 the ability to get the answers, and if
5 that causes adversity, so be it.

6 BY MR. LEWIS:

7 Q. But would you agree that the due
8 diligence process often fosters a collaborative
9 atmosphere between the issuer and the
10 underwriters?

11 A. It certainly always starts out
12 that way. Or I should rephrase, usually starts
13 out that way.

14 Q. In fact, in your report in the
15 AMF case --

16 A. Mm-hmm.

17 Q. -- Exhibit 324, Page 2,
18 Paragraph B --

19 MR. GLUCKOW: Hold on; just let
20 us get there.

21 Okay.

22 BY MR. LEWIS:

23 Q. -- the last sentence, you
24 wrote: "While the process often fosters a
25 collaborative atmosphere between issuer and

1 EDWARD NECARSULMER, III
2 underwriters, it is essential for due diligence
3 efforts to be thorough and their conclusions
4 factually supportable."

5 Do you believe that as a
6 general proposition?

7 A. I think that's just what I just
8 said, but, yes.

9 Q. Is there a reason that in
10 writing your report in this case you took out
11 the reference to the fostering of a
12 collaborative atmosphere?

13 A. No. I said to you before that I
14 used this as a template, but it was more in the
15 process of ordering things and what I wanted to
16 cover, but I frankly rethought what I would want
17 to include in my opinion.

18 MR. GLUCKOW: By the way, for the
19 record, you are comparing B of 324 with
20 B of 321?

21 MR. LEWIS: Yes.

22 MR. GLUCKOW: And comparing
23 collaborative versus cooperation?

24 MR. LEWIS: Right.

25 MR. GLUCKOW: Okay.

1 EDWARD NECARSULMER, III

2 BY MR. LEWIS:

3 Q. In your report in 321 you have
4 written: "While the process requires
5 cooperation between issuer and underwriters, it
6 is essential for due diligence efforts to be
7 thorough and their conclusions factually
8 supportable."

9 I don't have a question, but if
10 you want to respond, you are free.

11 MR. GLUCKOW: Wait for a
12 question.

13 BY MR. LEWIS:

14 Q. Do you believe that in the due
15 diligence process the underwriters are
16 frequently required to play devil's advocate?

17 A. Yes.

18 Q. When, in your opinion, does that
19 become necessary?

20 A. It's hard to be specific. I
21 mean, it could be from the first meeting to the
22 bringdown call right before you price. I mean,
23 it's just part of the ongoing process.

24 Q. Do you agree in principle that
25 the underwriters must employ a high degree of

1 EDWARD NECARSULMER, III

2 care in their investigations?

3 A. I certainly do.

4 Q. Do you agree that the
5 underwriters must independently verify the
6 company's representations?

7 MR. GLUCKOW: Objection to the
8 form. Asked and answered.

9 You can answer.

10 THE WITNESS: I don't think all
11 of the representations. I think -- you
12 know, the basic description of their
13 business and their business plan and
14 these kinds of things are -- if you are
15 going to do business with these people,
16 you traditionally accept those at face
17 value.

18 BY MR. LEWIS:

19 Q. Do you believe that in each case
20 in which an underwriter conducts due diligence
21 it must conduct a meaningful investigation of
22 the company?

23 MR. GLUCKOW: Objection to the
24 form.

25 You can answer.

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1 EDWARD NECARSULMER, III

2 THE WITNESS: I agree with that.

3 BY MR. LEWIS:

4 Q. Would you agree that in the due
5 diligence context the term investigation can be
6 defined as conducting a searching inquiry?

7 A. I don't really have a response
8 to that. I think that's a matter of semantics.
9 I think you -- whatever procedure and process
10 you use and you feel is adequate and reasonable,
11 you do.

12 Q. Is there a definition that you
13 have in your own mind for what an investigation,
14 a due diligence investigation, means?

15 A. Yes, but it can vary from
16 company to company and project to project.

17 Q. Would you agree that to
18 investigate means to inquire into a subject
19 matter with attention to detail?

20 A. That's a fair definition.

21 Q. That's a...?

22 A. Fair definition.

23 Q. Fair definition?

24 MR. GLUCKOW: Delayed objection
25 to the form.

1 EDWARD NECARSULMER, III

2 You can answer. And you have.

3 BY MR. LEWIS:

4 Q. Is it your view that if an
5 underwriter receives negative information from a
6 company of some sort, it's required -- it
7 becomes necessary to follow up on that
8 information?

9 MR. GLUCKOW: Objection to the
10 form. Vague and ambiguous.

11 You can answer.

12 THE WITNESS: I think it's
13 necessary to follow up on all
14 information - negative, positive, or
15 sideways.

16 BY MR. LEWIS:

17 Q. And noninformation, also?

18 MR. GLUCKOW: Objection to the
19 form.

20 You can answer.

21 THE WITNESS: If something is
22 self-evident or that's just a fact, no,
23 you don't need to follow up on it,
24 but...

25 BY MR. LEWIS:

1 EDWARD NECARSULMER, III

2 Q. Do you use the term red flags in
3 your work?

4 A. Yes.

5 Q. How do you use that term?

6 A. To define issues that either
7 require further attention or are not -- or
8 perhaps inconsistent with what we -- our, you
9 know, prior impression would be.

10 Q. Is it your opinion that it is
11 necessary for an underwriter to follow up on any
12 red flag that suggests that a registration
13 statement may not be complete and accurate?

14 A. I mean, the general answer to
15 the question is yes, but it's very hard just to
16 -- let me leave it there. Yes.

17 Q. Would you agree that merely
18 spending a lot of time on an investigation,
19 meeting a lot of times with management, and
20 reviewing a lot of documents is not necessarily
21 sufficient in a due diligence investigation?

22 MR. GLUCKOW: Vague and
23 ambiguous.

24 You can answer.

25 THE WITNESS: It doesn't -- it's

1 EDWARD NECARSULMER, III

2 not -- it's not the final answer.

3 BY MR. LEWIS:

4 Q. Have you been involved in due
5 diligence investigations where a great amount of
6 time and money was spent in the investigation
7 and the investigation was not to your
8 satisfaction?

9 A. Yes.

10 Q. And can you give any anecdotal
11 examples of that?

12 A. Well, all I can tell you is I
13 have been in situations where, either as a
14 commitment committee or as just a man heading up
15 a department, I didn't feel we had adequate
16 information to -- either in one specific area or
17 in general or that we had gone far enough to
18 sign off on underwriting the or presenting it to
19 whoever needed to sign off on it, so the answer
20 is yes.

21 Q. What did you do in that instance
22 or instances?

23 A. You go back and you do more
24 work.

25 Q. Did you ever hold up an offering

1 EDWARD NECARSULMER, III

2 to do more work?

3 A. Yes.

4 Q. How recently was that, in
5 general?

6 A. I would say that would have been
7 pre-1998.

8 Q. Do you have an opinion on
9 whether that portion of the due diligence
10 investigation which the underwriters in this
11 case did with respect to possible gray marketing
12 or Costco distribution of Adams products
13 satisfied industry standards?

14 MR. GLUCKOW: Objection to the
15 form. Vague and ambiguous. The report
16 speaks for itself.

17 You can answer.

18 THE WITNESS: I believe it does.

19 BY MR. LEWIS:

20 Q. So you do in fact believe that
21 the underwriters in this case did investigate
22 possible gray marketing or Costco distribution
23 of Adams products?

24 A. I believe that underwriters were
25 aware of the situation, made a judgment about

1 EDWARD NECARSULMER, III

2 how impactful it was upon the company, and acted
3 accordingly.

4 Q. And the opinion you have on that
5 subject is based, as is your overall opinion, on
6 industry standards rather than legal standards?

7 MR. GLUCKOW: Objection to the
8 form.

9 You can answer.

10 THE WITNESS: Yes.

11 BY MR. LEWIS:

12 Q. You are not relying on any cases
13 with respect to that?

14 A. Right.

15 Q. It's your observation of
16 industry norms?

17 A. Correct.

18 Q. Do you know of any investigation
19 that the underwriters conducted of gray
20 marketing or Costco issues other than what is
21 reflected in the writings that you have listed
22 in the attachment to your report?

23 MR. GLUCKOW: Object to the form.

24 You are referring to Exhibit A to
25 321?

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1 EDWARD NECARSULMER, III

2 MR. LEWIS: 321.

3 MR. GLUCKOW: Exhibit B?

4 MR. LEWIS: Exhibit B.

5 THE WITNESS: Those were the
6 materials that I reviewed, solely and
7 completely.

8 BY MR. LEWIS:

9 Q. Do you believe that the best
10 record of what actions the underwriters take in
11 a due diligence investigation is what they
12 preserve in writing?

13 MR. GLUCKOW: Objection to the
14 form. Vague and ambiguous.

15 You can answer.

16 THE WITNESS: I don't know how to
17 answer the question.

18 The written record is certainly,
19 you know, significant in the part that
20 lasts, but when you sit in a commitment
21 committee or when you sit with your
22 boss and you say, you know, these are
23 important issues, that could be equally
24 important, but certainly the only thing
25 I can refer to is what I've seen.

1 EDWARD NECARSULMER, III

2 BY MR. LEWIS:

3 Q. Based on your experience in the
4 industry, is it customary to record in writing
5 any significant activities you undertake as part
6 of a due diligence investigation?

7 MR. GLUCKOW: Objection to the
8 form. Vague and ambiguous.

9 You can answer.

10 THE WITNESS: Customary but not
11 exclusive.

12 BY MR. LEWIS:

13 Q. Can you explain what you mean by
14 that?

15 A. What I mean by that is that you
16 obviously want to write down and memorialize as
17 much as you possibly can, but this is a process
18 and you go out and you talk to people and you
19 are working with the CFO and you are talking
20 about an issue and you are -- you know, there
21 are things that you hope that the people on your
22 team are getting a feel for and digesting about
23 the company, and whether that all gets written
24 down or not, I can't tell you.

25 Q. Is it customary in your

1 EDWARD NECARSULMER, III

2 experience for an underwriter to document
3 discussions regarding determinations of
4 materiality?

5 MR. GLUCKOW: Objection to the
6 form. Vague and ambiguous.

7 You can answer.

8 THE WITNESS: I would say no.

9 BY MR. LEWIS:

10 Q. Why is that?

11 A. Because if, you know, again, you
12 are determining something is not material, you
13 probably move on.

14 Q. In your experience, is it
15 customary to document information which leads to
16 the decision to exclude something from a
17 prospectus?

18 MR. GLUCKOW: Object to the
19 form. Vague and ambiguous.

20 You can answer.

21 THE WITNESS: I'll answer again
22 no.

23 BY MR. LEWIS:

24 Q. Now, is it customary in the
25 industry to keep notes regarding a due diligence

1 EDWARD NECARSULMER, III

2 investigation, in your experience?

3 A. Again, customary but not
4 exhaustive. I mean, anecdotally, you -- someone
5 tells you you have currency exposure to some
6 kind of currency, so you investigate and you
7 find out that in fact the contracts are written
8 in dollars -- I mean, I'm making this -- I'm
9 using an example -- so therefore I would never
10 expect for someone to write down, gee, I checked
11 out whether we were exposed to the Zambian
12 kwacha and found out the contracts were written
13 in dollars. Because we had already reviewed the
14 contracts or we had the contracts as another
15 part of our thing, I wouldn't have expected that
16 to be a separate analysis or separate record.

17 Q. Is it your opinion that it is
18 desirable for an underwriter to prepare a list
19 of facts to be verified and then to address them
20 in a systematic fashion?

21 A. Desirable? Absolutely.

22 Q. What do you believe, as you sit
23 here and as you can recall, that the
24 underwriters did to investigate possible gray
25 marketing or Costco distribution of Adams

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1 EDWARD NECARSULMER, III

2 products?

3 MR. GLUCKOW: Objection to the
4 form. Overbroad.

5 In addition to what's in his
6 reports or in summarized reports?

7 BY MR. LEWIS:

8 Q. As you sit here, can you recall
9 anything that Adams did to investigate possible
10 gray marketing or Costco distribution of Adams
11 products? And if you need to refer --

12 THE WITNESS: May I ask a
13 question?

14 MR. GLUCKOW: Let me object to
15 the form. I think you said what did
16 Adams do.

17 THE WITNESS: Yeah, that's what I
18 was going to ask.

19 MR. GLUCKOW: Do you want to have
20 it read back or fix it?

21 MR. LEWIS: I'll fix it.

22 BY MR. LEWIS:

23 Q. As you sit here, can you recall
24 anything that the underwriters did to
25 investigate possible gray market distribution or

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1 EDWARD NECARSULMER, III

2 Costco distribution of Adams products?

3 MR. GLUCKOW: Objection to the
4 form.

5 You can answer.

6 THE WITNESS: They did a number
7 of things. They spent time with the
8 marketing people at Adams and the
9 subject was discussed. They
10 participated in the customer survey
11 process where that was, to the best of
12 my recollection, never mentioned as an
13 issue by a group of their -- a group of
14 customers.

15 BY MR. LEWIS:

16 Q. Anything else that you can
17 recall?

18 A. Those would be the two main
19 things that I can recall at this time.

20 Q. Incidentally, maybe I can
21 short-circuit some paper, you referred in your
22 rebuttal report to a number of specific pages at
23 Pages 1 and 2 of the rebuttal report --

24 A. Mm-hmm.

25 Q. -- under underwriting document

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1 EDWARD NECARSULMER, III
2 pages, Paragraph B, Paragraph C.

3 Am I correct that none of those
4 pages specifically referred to the terms gray
5 marketing or Costco?

6 MR. GLUCKOW: You mean the UND
7 document production pages as opposed to
8 the deposition transcripts?

9 MR. LEWIS: Yes, correct.

10 THE WITNESS: I don't recall. I
11 can't tell you what said what. I know
12 they were both used and -- I can
13 certainly tell you in the deposition
14 transcripts it came up often. I just
15 don't recall.

16 MR. LEWIS: Okay, if we may go
17 through them.

18 BY MR. LEWIS:

19 Q. Are you seeking to be qualified
20 in this case as an expert on the subject of what
21 disclosures were legally required?

22 MR. GLUCKOW: Objection to the
23 form.

24 You can answer.

25 THE WITNESS: To the extent that

1 EDWARD NECARSULMER, III

2 it's part of the due diligence
3 assignment, I guess the answer is yes,
4 but I wasn't specifically -- to the
5 best of my knowledge, I'm not
6 specifically trying to get there. I
7 think that it's all basically the same
8 issue to the investigation and I'm sure
9 that it was properly disclosed.

10 BY MR. LEWIS:

11 Q. But you say in your rebuttal
12 report that the defendants made a reasonable
13 judgment on disclosure?

14 MR. GLUCKOW: Where are you
15 referring?

16 MR. LEWIS: The rebuttal report.

17 MR. GLUCKOW: What page? What
18 paragraph?

19 MR. LEWIS: Let's go to Paragraph
20 C. "After doing proper due diligence,
21 the underwriters made a reasonable
22 judgment related to disclosure of this
23 issue."

24 MR. GLUCKOW: Maybe we are on
25 different pages. I'm not finding what

1 EDWARD NECARSULMER, III
2 you are referring to. 322, what
3 paragraph?

4 MR. LEWIS: 3.

5 MR. GLUCKOW: Oh, he said C.

6 THE WITNESS: I thought you said
7 C, I'm sorry.

8 BY MR. LEWIS:

9 Q. Let me read it in full: "To the
10 extent that either expert is opining that the
11 underwriters were unreasonable in concluding
12 that a disclosure regarding gray marketing was
13 not necessary, I disagree with that contention
14 and believe, that after doing proper due
15 diligence, the underwriters made a reasonable
16 judgment related to disclosure of this issue."

17 You do not contend, do you,
18 that you are an expert in gray markets?

19 A. Absolutely not.

20 Q. Did you ever have experience
21 with gray market issues before this litigation?

22 A. I actually did once. I worked
23 on a significant case for Daimler-Benz, and it
24 was -- one of the issues they were facing was
25 importation of cars not through their regular

1 EDWARD NECARSULMER, III

2 channels --

3 Q. Okay.

4 A. -- and then the dealers would be
5 responsible for the cars. And one of the issues
6 was dealer relations and, you know, the whole --
7 how the US network hung together. So I
8 certainly was, you know, involved in that
9 particular case, and, you know, we determined
10 that it wasn't material to what we were doing,
11 but it was out there.

12 I can't think of others, but I
13 suspect there have been others.

14 Q. When was that Daimler-Benz
15 matter?

16 A. I guess that was a '93
17 offering. There were two or three, the rights
18 offering and an equity offering and all around
19 the -- that offering all around the same time.
20 I just remember it being brought up and us
21 discussing it and then doing a little research
22 on it at the time.

23 Q. Well, is it your testimony that
24 if in this case there was in fact a serious gray
25 marketing issue and the underwriters did not

1 EDWARD NECARSULMER, III

2 detect it, they are excused for overlooking it?

3 MR. GLUCKOW: Objection to the

4 form. It assumes facts not in

5 evidence. It calls for speculation and

6 an incomplete hypothetical. Overbroad.

7 THE WITNESS: I'd be happy to try

8 to answer your question, I'm just not

9 sure I can.

10 BY MR. LEWIS:

11 Q. Well, let's take the

12 hypothetical assumption that -- not so

13 hypothetical -- that there was a serious

14 potential problem that existed, that the

15 underwriters conducted the investigation -- let

16 me reframe it.

17 Are you saying anything by your

18 opinion other than if the underwriters did a

19 diligent investigation, they were not required

20 to disclose something they didn't find?

21 MR. GLUCKOW: The same objections.

22 THE WITNESS: I fundamentally

23 agree with that, yes.

24 BY MR. LEWIS:

25 Q. Your opinion does not rest on

1 EDWARD NECARSULMER, III

2 materiality standards or SEC disclosure
3 standards, it's based in the reasonableness of
4 the investigation?

5 A. Yes.

6 Q. And nothing else?

7 MR. GLUCKOW: Objection to the
8 form.

9 The report speaks for itself. I
10 don't know if you want to engage in any
11 dialog on this.

12 In the conclusion section here,
13 the last section on Page 2, Summary
14 Number 4, it talks about both the
15 reasonableness of the investigation and
16 the reasonableness of the belief. If
17 you want to lump that all into the
18 reasonableness of the investigation,
19 that's fine. I just don't want there
20 to be an unclear record; that there's
21 clearly at least two pieces of it in
22 terms of the written opinion.

23 BY MR. LEWIS:

24 Q. Let me back up a different way.

25 In a case in which a problem

1 EDWARD NECARSULMER, III
2 exists, the underwriters conduct a diligent
3 investigation, and notwithstanding having
4 conducted an investigation in full accordance
5 with reasonable industry standards, the
6 problem is still out there and it's not
7 disclosed in the prospectus or registration
8 statement and the problem then thereafter
9 bites the company, are you saying that the
10 underwriters have no disclosure obligation
11 because they conducted a reasonable
12 investigation?

13 MR. GLUCKOW: The same objections
14 as before. Incomplete hypothetical.
15 It calls for speculation. It calls for
16 a legal conclusion. Incomplete
17 hypothetical. Assumes facts not in
18 evidence.

19 You can answer.

20 THE WITNESS: I mean, here's what
21 I would say. I would say that to the
22 extent that the underwriters made a
23 reasonable and diligent investigation,
24 they discovered -- and in this
25 investigation they discovered whatever

1 EDWARD NECARSULMER, III
2 this thing is out there, they decided
3 it wasn't significant to the company's
4 sales and earnings, and then they
5 decided to move on, I would support
6 that, I think that's -- I think that's
7 proper.

8 BY MR. LEWIS:

9 Q. And if that happened, do you
10 believe that excuses the company from any
11 disclosure obligation?

12 MR. GLUCKOW: Objection to the
13 form. Outside the scope of the
14 opinion. He's not offering any expert
15 testimony as to the company's
16 disclosure obligations; he's offering
17 expert testimony with respect to the
18 underwriters' investigation and the
19 reasonableness of the underwriters'
20 beliefs in light of that investigation.

21 BY MR. LEWIS:

22 Q. Well, let me back up and ask
23 that question, and that is at the heart of what
24 my question is about. Does your opinion in any
25 way purport to address the company's disclosure

1 EDWARD NECARSULMER, III

2 obligation, to your knowledge?

3 A. No, I wasn't asked -- it's not
4 within the scope of my assignment.

5 Q. And your opinion with respect to
6 disclosure such as it is relates only to the
7 underwriters' disclosure obligations, is that
8 fair?

9 MR. GLUCKOW: Objection to the
10 form. It's not the underwriters'
11 disclosure obligations; it's the
12 underwriters' investigation and the
13 reasonableness of their belief in the
14 accuracy and completeness of the
15 registration statement.

16 I'm not sure what you're getting
17 at with your parsing disclosure
18 obligations of the company --

19 MR. LEWIS: I'm sitting here and
20 letting you filibuster, but you can
21 object to the questions, and you have,
22 and you've done it fully, on this whole
23 subject matter. You don't have to
24 supply what his opinion is about. He
25 knows what his opinion is about, and he

1 EDWARD NECARSULMER, III

2 can tell me that, he can correct me,

3 but --

4 MR. GLUCKOW: I just think your
5 question is inherently misleading, and
6 I'm trying to make sure that both I and
7 the witness understand what it is you
8 are trying to ask.

9 BY MR. LEWIS:

10 Q. Let's look at Paragraph F of
11 your rebuttal report, Exhibit 322.

12 You write, starting in the
13 second sentence of Paragraph F: "While
14 Ochoa's report is not clear on this point,
15 although underwriters often review filings of
16 other companies in the same industry, as they
17 did here, the mention of a risk in such
18 filings is not necessarily determinative of
19 whether the risk needs to be included in the
20 issuing company's registration statement."

21 Can you explain what you mean
22 by that?

23 A. Sure.

24 What I'm saying is basically
25 that it's certainly good practice to look at

1 EDWARD NECARSULMER, III
2 what the competition is doing, what they are
3 filing, the most recent, whatever, 10-K,
4 whatever they are filing with the SEC. The
5 fact that you see something doesn't
6 necessarily mean that it's a requirement to be
7 included in either your documents or in your
8 opinion.

9 I guess what I'm trying to say
10 in a broader sense is there's a huge body of
11 information out there, both things you learn
12 from the company and the things you might
13 learn from the industry and whatever else, and
14 when it comes down to it, the underwriter's
15 job is to go through those things and make a
16 decision as to what is material and what is
17 not.

18 Q. You went on to say: "Each
19 factual situation is different and the
20 underwriters must evaluate appropriate
21 disclosure on an individual basis," correct?

22 A. Correct.

23 Q. Would it be fair to say that
24 your position is that because gray marketing
25 affects different companies in different ways,

1 EDWARD NECARSULMER, III

2 each case has to be separately evaluated?

3 MR. GLUCKOW: Objection to the
4 form. Vague and ambiguous.

5 You can answer.

6 THE WITNESS: I think that's
7 fair.

8 BY MR. LEWIS:

9 Q. After the due diligence
10 investigation in the Daimler case that you
11 mentioned, did gray marketing later affect the
12 results of Daimler-Benz?

13 A. No, or not to my knowledge.
14 I... Not to my knowledge.

15 Q. What information do you
16 understand the underwriters received from Adams
17 itself about gray marketing or Costco by the
18 time of the effective date of the IPO?

19 A. They -- they -- you know,
20 there's a number of items. They knew that an
21 action -- I'm not sure of the name for it and if
22 action is the right word for it, but there had
23 been a legal challenge. I think they had
24 records from talking to marketing people, you
25 know, that they had discussed it. Certainly